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No. 98-131

In The
Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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14 pp

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2, Public Citizen respectfully moves the Court for leave to file the attached brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.

1. Public Citizen is a national consumer organization with 120,000 members. Since its founding in 1971, Public Citizen has urged the enactment and enforcement of high ethical standards covering federal officials and those individuals or groups that lobby to obtain economic benefits from the federal government. Public Citizen believes that such policies are needed to promote confidence in government and to prevent corruption or the appearance of corruption.

2. Public Citizen seeks leave to file this brief because of its concern that the decision below misconstrued the federal gratuity statute by blurring the line between bribes and illegal gratuities in a way that could make criminal sanctions unavailable when, as here, a Washington, D.C. lobbyist lavishes gifts on a federal official charged with making decisions worth millions of dollars to a lobbyist's client or employer.

3. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has declined to consent.

Wherefore, for the foregoing reasons, Public Citizen respectfully asks that this motion be granted.

Respectfully submitted,

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TABLE OF CONTENTS

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* 1
TABLE OF CONTENTS i
TABLE OF AUTHORITIES i
BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER 1
INTEREST OF *AMICUS CURIAE* 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5
CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976) ... 5
United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) .. 4
United States v. Bustamante, 45 F.3d 933 (5th Cir. 1995) . 5
United States v. Evans, 572 F.2d 455 (5th Cir. 1978) 5
United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986) .. 5
United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979) (*en banc*), *aff'd*, 447 U.S. 10 (1980) 5
United States v. Umans, 368 F.2d 725 (2d Cir. 1966) 5

Statutes:

18 U.S.C. § 201(a)(3) 3
18 U.S.C. § 201(c)(1)(A) ..... *passim*
18 U.S.C. § 201(c)(1)(B) 8-9

Regulations:

5 C.F.R. § 2635.102(a) 8
5 U.S.C. § 2635.102(h) 8
5 C.F.R. § 2635.204(a) 9
5 C.F.R. § 2635.204(b) 9-10

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Public Citizen is a non-profit consumer organization with over 120,000 members nationwide. Since its founding in 1971, Public Citizen has urged the enactment and enforcement of high ethical standards governing federal officials and those individuals or groups that lobby to obtain economic benefits from the federal government. Public Citizen and its members believe that such policies are needed to promote confidence in government and to prevent corruption or the appearance of corruption. They are concerned that the District of Columbia Circuit in this case has blurred the line between bribes and unlawful gratuities and has required a higher level of proof in unlawful gratuity cases than has any other appellate court. If the decision below is allowed to stand, the result will be that gift-giving to federal officials will be judged by a more permissive standard in the nation's capital than in it would be in other jurisdictions.

STATEMENT

In the decision below, the District of Columbia Circuit reversed a criminal conviction of respondent Sun-Diamond Growers of California, a large farm cooperative made up of individual member cooperatives. Sun-Diamond had been found guilty after a jury trial of giving $5900 in unlawful gratuities to Mike Espy, the Secretary of Agriculture. These gratuities consisted of tennis tickets, luggage, meals, and a framed print and crystal bowl, which were given to Espy by Richard Douglas, Sun-Diamond's vice-president for corporate affairs, who had known Espy since college. Pet. App. 2, 4.

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[1] Pursuant to Rule 37.6, Public Citizen states that its counsel wrote this entire brief and that no outside entity made a monetary contribution toward the preparation or submission of this brief.

The gratuities were given to the Secretary at a time when the Department of Agriculture ("USDA") was considering several issues affecting Sun-Diamond. Two in particular had potentially major economic consequences for Sun-Diamond and its members. First, USDA operated the "Market Promotion Program," a subsidy program designed to promote U.S. farm exports. According to the Independent Counsel, this program generated $23.9 million in federal grants to Sun-Diamond members from 1990 to 1995. Pet. App. 3. In 1993, Congress required USDA to steer more of the money in this program to "small-sized entities." Pet. App. 3. How the Secretary defined "small-sized entities" was important to Sun-Diamond, which wanted the definition written so that individual growers who belonged to Sun-Diamond's member cooperatives might be directly eligible for such grants. Pet. App. 3. This was an issue that Sun-Diamond's vice-president, Richard Douglas, discussed directly with Secretary Espy. See Brief for Appellee at 9, D.C. Cir. No. 97-3072.

The second major issue of concern was a proposed ban of methyl bromide, an ozone-depleting chemical that some of Sun-Diamond's members used to treat their crops. Although the ban was being considered by the Environmental Protection Agency, the evidence indicated that Sun-Diamond wanted USDA weigh in against such a ban, or at least urge a delay in its implementation. Pet. App. 4. This too was an issue that Sun-Diamond's vice-president raised directly with the Secretary, and it was a critical matter for Sun-Diamond members because there was no ready substitute for methyl bromide. Brief for Appellee at 9-10, D.C. Cir. No. 97-3072.

In the first count of the indictment, the Independent Counsel charged that Sun-Diamond's gifts to Secretary Espy violated the unlawful gratuity statute, 18 U.S.C. § 201(c)(1)(A),

which states in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . . shall be fined under this title or imprisoned for not more than two years, or both.

The statute goes on to define "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

In reversing the conviction, the Court of Appeals believed that the "key dispute here is over how close a link the government must show between Sun-Diamond's gifts and official acts that the Secretary of Agriculture performed or might perform." Pet. App. 3. The court concluded that the phrase "for or because of any official act," which describes the level of intent needed for a violation of the unlawful gratuity statute, requires an intent "either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts." Pet. App. 7. Thus, if Mr. Douglas gave the Secretary gifts "merely to win his generalized sympathy for Sun-Diamond," those gifts would not be illegal gratuities unless "the jury could find that Douglas sought this generalized sympathy to influence Espy to perform one or more official acts sometime in the future." Pet. App. 10.

The Court of Appeals acknowledged that the illegal

gratuity statute operates side by side with federal bribery laws, and that "an unpromised benefit for a past governmental favor" would constitute an illegal gratuity, if not a bribe. Pet. App. 8. When gifts are made with an eye towards future acts, however, the government must show that the payment was being made "'because of a specifically identified act.'" *Id., quoting United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974)(emphasis in panel decision omitted).

As the Court of Appeals read the jury instructions, however, the trial judge permitted the jury to convict if it found that Secretary Espy had received things of value merely because of his official position. The Court of Appeals acknowledged that its reading of the gratuity statute was narrower than the reading adopted in other circuits, Pet. App. 11, but concluded nonetheless that the conviction could not stand and that a new trial was required.

The Independent Counsel sought rehearing, which was denied. Pet. App. 32. Judge Wald, although concurring with that decision, nonetheless deemed the decision worthy of review by this Court, noting that the panel's distinction between "bestowing gifts and gratuities on a high government official who has regulatory jurisdiction over the giver solely because of that official's 'position,' rather than in the hopes of obtaining a favorable attitude in any future regulatory act, may commend itself to lawyers and judges, but I suspect it would not pass the 'snicker test' with laymen." Pet. App. 34.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the decision below creates an irreconcilable conflict between the circuits on an important question of federal law. As the Independent Counsel argues, and as the Court of Appeals appeared to acknowledge,

the latter's interpretation of the federal gratuity law is at odds with the results reached in several other circuits. *Compare United States v. Umans*, 368 F.2d 725 (2d Cir. 1966); *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979)(*en banc*), *aff'd*, 447 U.S. 10 (1980); *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978); *United States v. Bustamante*, 45 F.3d 933 (5th Cir. 1995); *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976). *See also United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986).

We note too the incongruity that this decision creates. This ruling, if allowed to stand, will set the standard for criminal prosecutions in the District of Columbia, where many lobbyists earn a living trying to influence government decision-makers on national policy matters. The decision thus sets up a dichotomy under which conduct that may warrant criminal sanctions elsewhere would be subject to a more lenient standard "inside the Beltway." Indeed, gratuities paid to low-level officials at a regional office would be punished more severely than gratuities paid to their superiors sitting in Washington, a paradoxical outcome that underscores the importance of this case and the need for granting review.

We do not intend to repeat the legal arguments made by the Independent Counsel, which are cogent and persuasive. We wish instead to focus on the implications of the decision below for the enforcement of ethical standards in government. We suggest that those considerations indicate the significance of the decision below and the need for review by this Court.

The decision below blurs the distinction between bribes and illegal gratuities when a gift is bestowed before a government official takes a particular action. The District of Columbia Circuit acknowledged that in order to make out a case of

bribery, an explicit *quid pro quo* is necessary. Pet. App. 7-8. To prove an unlawful gratuity, however, the Court of Appeals held that a prosecutor must be able to identify a "specifically identified act" that the donor wished the government official to take, Pet. App. 8, and no criminal violation can be found if gifts are given with a "vague hope of inducing warm feelings toward the donor" or "merely to win [an official's] generalized sympathy." Pet. App. 9, 10.

This analysis comes perilously close to eviscerating the unlawful gratuity statute. Many trade associations, corporations and other groups that maintain a lobbying presence in Washington, D.C. are not single-issue organizations, but have a number of items on their agenda, often before the same agency. Thus, at any one time, and as the facts here illustrate, there are usually several favorable actions -- or "official acts" -- that these entities would like a particular agency to take on matters of concern to them.

How then does a prosecutor prove which "specifically identified act" was the impetus for a gift or gifts to a government official? Take this case, for example. Most lobbyists know that they are unlikely to win on every issue. Also, the regulatory process is such that one may be able to obtain some relief on a given issue, though not necessarily all that one would prefer. Thus, in all likelihood, Sun-Diamond would have likely declared victory had it managed to persuade the Secretary on either the subsidy issue or the methyl bromide issue. In addition, Sun-Diamond would likely have declared victory by obtaining only limited relief on both issues, for example, if USDA decided to define "small-sized entities" in a way that helped some of its members, if not all of them, or if any ban on methyl chloride was phased in over a six-month period, rather than a three-month period or immediately.

What, then, is the "specifically identified act" that the U.S. Open tickets, the thousands of dollars worth of luggage, the restaurant bills and the other items were intended to influence? Sun-Diamond, of course, sees no connection, but its argument demonstrates the gaping loophole that would be created if the decision below is allowed to stand.

The company asked the following rhetorical question in its brief to the Court of Appeals:

> Are Douglas' dinners and sporting events transformed into felonious acts merely because he elected to seek reimbursement from his employer, recognizing, as he must, that his very friendship with Espy is at once personal yet accords him an opportunity to better understand and learn about the Department of Agriculture? Is Sun-Diamond really on notice that approving these expense reimbursements is unlawful even though the underlying expenditures had no relation to any official act, as required by statute?

Brief for Appellant at 25, D.C. Cir. No. 97-3072. With due respect, it is difficult to see how the size and nature of Mr. Douglas's gift-giving qualifies as such a modest and lawful effort to let him "better understand and learn about the Department of Agriculture," but that would seem to be a plausible defense under the decision at issue here.

And Sun-Diamond's gifts were truly extravagant under federal ethics standards. Trading on a friendship going back to their college years, Mr. Douglas gave the Secretary the following items, which Sun-Diamond wrote off as legitimate business expenses:

- a weekend in New York, including tickets to the 1993

U.S. Open tennis tournament, worth $2295;
- luggage worth $2427;
- meals worth $665; and
- a framed print and crystal bowl worth $524.

Pet. App. 4.[2]

Compare this largesse with what is allowed under regulations issued by the Office of Government Ethics ("OGE"), which cover executive branch agencies and officials, 5 C.F.R. § 2635.102(a), (h). These rules offer detailed guidance to officials and lobbyists interested in what is and is not acceptable here. The regulations clearly state that, with certain exceptions, "a gift accepted under the standards in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)," which bars the receipt of unlawful gratuities and is thus the flip-side of the statute at issue here.

OGE rules state that government officials may not accept gifts of more than $20 at any one time or that aggregate $50 in a single year. 5 C.F.R. § 2635.204(a). Indeed, OGE provides specific examples that illustrate how strict these guidelines are. Thus, if a government official gives a speech to a trade group and is given a book and a map, one of which is worth $18 and the other $15, the official can accept one, but not both, since the

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[2] The $2295 that Sun-Diamond spent on Secretary Espy for this weekend in New York did not include an additional $6890 that was spent on the Secretary's girlfriend, Mr. Douglas and his girlfriend, all of whom accompanied the Secretary on this trip.

Apart from the gifts set forth in the text, Douglas also provided $3100 so that the Secretary's girlfriend could accompany him to an international conference in Greece in 1993. The Independent Counsel charged in a separate count that this was an unlawful gratuity, but the jury acquitted on this count.

"one-time" value is greater than $20, even though the aggregate is under $50. *Id.*, Example 2. Similarly, if someone such as Mr. Douglas wanted to invite the Secretary and his girlfriend to attend a play that cost $30 per ticket, the Secretary could not accept the tickets and could "attend the play only if he pays the full $60 value of the two tickets." *Id.*, Example 1.

OGE regulations also address Sun-Diamond's defense at trial, namely, that there was a personal relationship between the Secretary and Mr. Douglas that stretched back to their college days. OGE makes it clear that gifts based on personal friendships are not forbidden, within certain limits:

> An employee may accept a gift given under circumstances which *make it clear* that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend *personally pays for the gift*.

5 C.F.R. § 2635.204(b)(emphasis added).

Again, OGE offers examples that show how far out of line Sun-Diamond's gratuities were in this case. Specifically, OGE advises that three partners at a law firm that practices before the Federal Trade Commission could not invite an FTC lawyer, at the firm's expense, to join them in a golf tournament that charged $500 per foursome, even though the FTC lawyer "and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC." *Id.*, Example 2. OGE explains that the fact that "the fees are to be paid by the firm" indicates that this is "not a personal friendship but a business relationship that is the motivation behind the partners'

gift." *Id.*

By contrast, if an employee at the FDIC is dating a secretary at a regulated bank, and if the bank has given each secretary two tickets to a play and encouraged them to bring a family member or friend to the show, the FDIC employee may accept the free ticket, which OGE views as "given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship." *Id.*, Example 1.[3]

These rules cover other situations in considerable detail, but these examples should suffice to make our point that the conduct at issue here stepped way over the line. Thus, we are not dealing with some hyper-technical violation of federal law that is being pursued by an over-zealous prosecutor. Instead, the case involves a lobbyist's effort to lavish gifts on a high-ranking government official who is in a position to take or affect

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[3] These examples answer the Court of Appeals' apparent concern that the Independent Counsel's theory of liability was unduly expansive and could trigger liability under the unlawful gratuity law if a newly appointed judge were invited to a baseball game by an old friend whose employer had a case pending in that court. Pet. App. 10-11 n.4. If the ticket cost $20 or less, there would be no problem. If the friend paid for the ticket or if they went to baseball games together each year, the safe harbor in section 2635.204(b) likely applies, as it would seem "clear that the gift is motivated by a . . . personal friendship" rather than the judge's position.

Of course, that scenario is light years away from the situation here, which is comparable to the long-time friend's employer buying tickets to an out-of-town World Series game for the judge, the friend and their spouses, giving the judge expensive luggage, and buying meals along the way.

official actions worth millions of dollars to Sun-Diamond's members. Whether this conduct is enough to constitute a violation of the federal gratuity statute or whether a more precise connection to a specific "official act" must be proven is an important question that warrants plenary review.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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